

SECTION II

TAB 22

Teresa Brenner

December 4, 2009

CONFIDENTIAL

Page 1

Confidential - Brenner

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs. 09-CV-6829

BANK OF AMERICA,

Defendant.

-----x

CONFIDENTIAL

TERESA BRENNER

New York, New York

Friday, December 4, 2009

Reported by: Steven Neil Cohen, RPR

Job No. 305520

Teresa Brenner

December 4, 2009

CONFIDENTIAL

Page 285

1 Confidential - Brenner

2 expected losses for Merrill Lynch could
3 be in the fourth quarter.

4 BY MR. VASILESCU:

5 Q. Did you start getting a sense of
6 that in November of 2008?

7 A. I recall discussing that issue in
8 the middle of November until before
9 Thanksgiving of 2008.

10 Q. Did that issue prompt an inquiry
11 to Wachtell, the outside counsel, regarding
12 what the duties to update disclosures would
13 be?

14 MS. OH: Objection. Form.

15 You can answer.

16 THE WITNESS: My recollection of
17 that time period is a discussion between
18 myself and Tim Mayopoulos, and I have
19 again another recollection of a
20 discussion during that time period with
21 myself and Tim and Ed Herlihy and
22 perhaps some other attorneys at
23 Wachtell.

24 I don't know -- I can't remember
25 exactly which days, which discussions

Teresa Brenner

December 4, 2009

CONFIDENTIAL

Page 286

1 Confidential - Brenner
2 occurred, but that was the general time
3 frame.

4 And I also recall our belief that
5 after looking at that, that that fact
6 and the current disclosure in the proxy
7 statement as well as the documents
8 incorporated by reference and the ones I
9 specifically recall collecting are the
10 Merrill Lynch 10-Qs and the Bank of
11 America 10-Qs, that the ultimate
12 conclusion was that no further
13 disclosure was necessary or warranted.

14 BY MR. VASILESCU:

15 Q. Do you know if that analysis
16 concerned Rule 14A9 of the federal
17 securities laws?

18 A. The analysis was, just my
19 understanding again, is just as securities
20 and a generalist, just the general
21 disclosure rules.

22 I don't recall specifically
23 looking at rule -- schedule 14A or generally
24 the proxy rules but I don't specifically
25 looking at 14A9 or having a-- or I don't

TAB 23

Gregory Curl

December 11, 2009

CONFIDENTIAL

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Case No.
09-CV-6829

BANK OF AMERICA CORP.,

Defendants.

CONFIDENTIAL VIDEOTAPE DEPOSITION OF
GREGORY CURL, taken by Plaintiff, at the offices
of the Securities and Exchange Commission, Three
World Financial Center, New York, New York, on
Friday, December 11, 2009, commencing at 9:40
a.m., before Debra Stevens, a Registered
Professional Reporter and notary public, within
and for the State of New York.

Gregory Curl

December 11, 2009

CONFIDENTIAL

Page 205

1 G.Curl - Confidential

2 was. There was -- I was in a conference room in
3 Wachtell sometime around Thanksgiving, but I
4 can't recall exactly when. And there was a phone
5 conversation occurring in which I was not
6 directly involved between some people in
7 Charlotte -- and I can't recall who it was -- and
8 Ed Herlihy and Nick Demmo in which I heard some
9 mention of disclosure.

10 Q. What did you hear more specifically?

11 A. I can't recall other than the fact I
12 do remember there was some conversation about
13 disclosure. But disclosure is not something that
14 I am involved in or have any real knowledge of so
15 I just wasn't paying attention.

16 Q. Did you discuss with Mr. Demmo or
17 Mr. Herlihy what they had discussed with people
18 from Charlotte?

19 A. Not that I recall.

20 Q. Aside from that conversation where you
21 were in the room and Mr. Herlihy and Mr. Demmo
22 were discussing disclosure with someone from
23 Charlotte, did you have any discussions at any
24 point after learning of the projected loss of
25 5.3 billion and before your next conversation in

Gregory Curl

December 11, 2009

CONFIDENTIAL

Page 206

1 G.Curl - Confidential

2 early December with Mr. Price about Merrill
3 losses?

4 MR. LIMAN: Objection to form.

5 A. Not that I recall.

6 Q. Did you have any discussions during
7 that time frame, the second half of
8 November 2008, concerning the disclosure of
9 Merrill's projected losses?

10 MR. LIMAN: Objection to form.

11 A. Not that I recall other than the two
12 instances.

13 Q. Let me show you, Mr. Curl, what I have
14 marked as Exhibit 222.

15 (Plaintiff's Exhibit 222,
16 Document, Bates BAC-502-WLRK 4641
17 through 4642, 2 pages, was marked for
18 identification.)

19 MR. BORYSHANSKY: This exhibit has
20 two pages to it. The front page has an
21 e-mail at the top from Mr. Curl to Ed Herlihy
22 and it is Bates numbered BAC-502-WLRK 4641
23 through 4642.

24 Q. Mr. Curl, let me direct your attention
25 to the e-mail that you had sent to Ed Herlihy on

TAB 24

C O N F I D E N T I A L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

09-CV-6829

BANK OF AMERICA CORP.,

Defendant.

November 16, 2009
9:39 a.m.

Deposition of NICHOLAS DEMMO, taken by Plaintiff,
pursuant to Subpoena, held at Securities and
Exchange Commission, Three World Financial
Center, New York, New York, before Lisa
Rosenfeld, a Shorthand Reporter and Notary
Public within and for the State of New York.

Nicholas Demmo

November 16, 2009

CONFIDENTIAL

185

1 Demmo - Confidential

2 there was a problem with shareholders and bonuses
3 as a result of government scrutiny that related
4 to the Merrill Lynch merger certainly.

5 MR. VASILESCU: Let's mark as
6 Plaintiff's 118 an e-mail from Eric Roth
7 to Ed Herlihy dated November 13th, 2008.
8 And Exhibit 119 an e-mail from Jonathan
9 Golden to Eric Roth.

10 (Plaintiff's Exhibit 118, e-mail from
11 Eric Roth to Ed Herlihy dated
12 November 13th, 2008, was so marked for
13 identification.)

14 (Plaintiff's Exhibit 119, e-mail from
15 Jonathan Golden to Eric Roth, was so
16 marked for identification.)

17 Q. 118 is the one from Eric Roth to Ed
18 Herlihy. Now you didn't get these e-mails, but
19 did you have an understanding there was any sort
20 of research or query done regarding a duty to
21 update filings?

22 A. In November related to this matter?

23 Q. That's right.

24 A. I don't remember any of this, no.

25 Q. Was there a -- do you have any

Nicholas Demmo

November 16, 2009

CONFIDENTIAL

186

1 Demmo - Confidential

2 understanding of -- who is Jonathan Golden?

3 A. He is an associate at Wachtell.

4 Q. Who is Eric Roth?

5 A. Litigation partner at the firm.

6 Q. And was he working on the Bank of
7 America matter?

8 A. He was working on -- yes, litigation
9 related to Bank of America matter.

10 Q. But is that the private -- the other
11 actions that were already filed or was he working
12 at all in relation to the disclosures that were
13 being made by Bank of America?

14 A. The only overlap that he had on
15 disclosure matters relating to Bank of America
16 outside of the Merrill Lynch litigation was on
17 the 12th, 13th of November when we involved him
18 in a disclosure question that came up.

19 Q. What disclosure issue was that?

20 A. It was the question had arose as a
21 result of Bank of America -- Merrill Lynch
22 reported to Bank of America that as a result
23 of -- primarily as a result of adjustments in the
24 value of certain assets that it had on its books
25 between the end of September and end of October

Nicholas Demmo

November 16, 2009

CONFIDENTIAL

187

1 Demmo - Confidential

2 was they had a 7 billion dollar pre-tax loss.

3 Q. Was there a discussion whether or not
4 B of A or Merrill Lynch needed to disclose that
5 loss?

6 A. Yes.

7 Q. What was the analysis if you can
8 recall?

9 A. Well, it was over a period of a week
10 and a half. The question to my recollection
11 originally arose as a question of whether we
12 needed to make any additional disclosure, I think
13 that call was a relatively short call. The next
14 day we had a call where Tim Mayopoulos, the
15 general counsel of Bank of America, rather than
16 trying to figure out whether we should make
17 disclosure, determined that we simply would make
18 disclosures.

19 So we talked about the type of
20 disclosure that we would make thinking along the
21 lines of trend disclosure talking about factors
22 like changes in credit spreads and whatnot, but
23 types of factors that had driven the 7 billion
24 dollar pre-tax mark, and then eventually over the
25 course of I believe it was November 20th came to

Nicholas Demmo

November 16, 2009

CONFIDENTIAL

188

1 Demmo - Confidential

2 realize that in fact the type of disclosure we
3 were talking about making on the 13th was exactly
4 the sort of disclosure that both Merrill Lynch
5 and Bank of America had previously made in their
6 most recent filings.

7 MR. MIRVIS: If I could just
8 interject one thing so people who might
9 look at this one day don't get confused.
10 The Exhibit PX 118 is a memorandum dated
11 August 25, 1999, but you'll notice if you
12 happen to look up in the upper right-hand
13 corner it says WLRK draft 10/28/09, and
14 the reason for that is --

15 MR. ANDERS: Are you qualified to
16 answer this?

17 MR. MIRVIS: If I make a mistake
18 you'll tell me.

19 MR. VASILESCU: I think I know why.

20 MR. MIRVIS: The attachment to the
21 memo is an NRL, so when you recreate the
22 document the machine changes the date to
23 the current date. You know more about
24 that than I do.

25 MR. ANDERS: We had to reprint out

Nicholas Demmo

November 16, 2009

CONFIDENTIAL

212

1 Demmo - Confidential

2 where that was discussed.

3 Q. And what was discussed?

4 A. I don't remember clearly at this
5 point, but in I believe Mr. Curl -- I'm trying to
6 remember whether -- there was a call two days
7 after this which I don't remember whether Mr.
8 Curl was on but Mr. Joe Price was on the call,
9 and he talked to Merrill Lynch's financial
10 position and their expectations at the time.

11 Q. And did Mr. Curl or anyone at Bank of
12 America communicate to you or anyone at Wachtell
13 that you know of a dollar amount of the projected
14 losses for the fourth quarter for Merrill Lynch?

15 A. I believe on -- a week earlier we
16 understood that they -- sorry, Merrill Lynch had
17 lost again, I say lost, they had had assets that
18 didn't go anywhere but had been written down by
19 \$7 billion on a pre-tax basis and, you know, and
20 but so far November had been essentially flat.

21 Two days after this there was another
22 call where I don't believe the information was
23 new information but there was more detailed
24 information regarding Merrill's financial
25 position. I think at that point although

Nicholas Demmo

November 16, 2009

CONFIDENTIAL

213

1 Demmo - Confidential

2 obviously there was uncertain times, I believe
3 that the expectation for the quarter was wound up
4 being about the same as it had been a week
5 earlier, just looking at the -- if you had just
6 looked at the loss in the portfolio.

7 Q. And did that number as time went on
8 and the fourth quarter progressed, did that
9 number grow in terms of what you understood it to
10 be?

11 A. The final number I believe was
12 \$15.8 billion after tax, 20 something pre-tax.

13 Q. And prior to the shareholders vote,
14 what was your recollection of the largest amount
15 of losses that you had an understanding of at
16 Merrill Lynch?

17 A. I think people were talking about
18 something around a \$5 billion, slightly higher
19 maybe after tax loss.

20 Q. And that communication in terms of
21 the number of -- where did it come from generally
22 within Bank of America?

23 A. We first learned about the October
24 losses from Tim Mayopoulos and it was Joe Price
25 who I remember giving detail, at least most of

Nicholas Demmo

November 16, 2009

CONFIDENTIAL

214

1 Demmo - Confidential

2 the details on the number around November 20th.

3 Q. And then subsequent to the
4 shareholder vote, when did you learn that it was
5 \$15 billion?

6 A. After the call on the 20th I heard on
7 December 12th, I believe it was a Friday evening,
8 that they were at a \$14 billion number, which
9 I -- which was a pre-tax number.

10 Q. The shareholder vote was on
11 December 5th?

12 A. The shareholder vote was on
13 December 5th.

14 Q. Did anybody from Wachtell go to it?

15 A. Yes, I did along with one of my
16 associates.

17 Q. And did you any understanding prior
18 to then as to whether Merrill was consulting with
19 Bank of America on the VICP in terms of
20 implementing the VICP for 2008?

21 A. Well, obviously there are those
22 e-mails we looked at a little bit ago in
23 mid-November where the Bank of America people
24 were at least talking about that possibility --
25 talking about VICP.

TAB 25

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 1

C O N F I D E N T I A L

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

09-CV-6829

BANK OF AMERICA CORP.,

Defendant.

November 17, 2009
10:45 a.m.

Deposition of EDWARD D. HERLIHY, taken by
Plaintiff, pursuant to Subpoena, held at
Securities and Exchange Commission, Three
World Financial Center, New York, New York,
before Lisa Rosenfeld, a Shorthand Reporter
and Notary Public within and for the State
of New York.

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 150

1 Herlihy - Confidential

2 time -- were you asked -- did you ask any
3 attorneys at Wachtell to look into what is the
4 law on duty to update statements in filings with
5 the SEC, particularly proxy statements?

6 A. No, I did not.

7 Q. Why don't you take a look at Exhibit
8 118 and 119, and 118 is an exhibit -- is an
9 e-mail with an attachment from Eric Roth to Ed
10 Herlihy dated November 13th, 2008 and it's
11 forwarding an e-mail from Warren Stern dated
12 November 13th in which he writes "Here's my
13 memo," and attached is a memo dated August 25th,
14 1999 from Warren Stern to file, re Bank of
15 America affirmative disclosure duties under Rule
16 14a-9.

17 Why did Mr. Roth send you this
18 document?

19 A. I think he sent it to me, which I've
20 never read it by the way, I think he sent it to
21 me because he was going to participate in a
22 conference call, we had to discuss disclosure
23 issues with Bank of America.

24 Q. Who was that conference call with at
25 Bank of America?

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 151

1 Herlihy - Confidential

2 A. I think it was with Tim Mayopoulos,
3 Teresa Brenner, Joe Price and someone else that
4 used to work for Joe Price or two different
5 people that worked for Joe Price.

6 Q. Now, the attached memo written by Mr.
7 Stern, and Mr. Stern -- let me rephrase the
8 question. Mr. Stern is one of your partners, is
9 that right?

10 A. Correct.

11 Q. And he has a lot of experience in
12 litigation, isn't that right?

13 A. Yes.

14 Q. You wrote this memo in 1999, and
15 since that time did you ever read this memo?

16 A. I never read it.

17 Q. Do you have any understanding of
18 what's in this memo?

19 A. I never looked at it.

20 Q. Now, do you have any understanding of
21 what requirements are there under the law to a
22 duty to update under Rule 14a-9?

23 A. That's a hypothetical I can't answer.
24 There's generally -- I don't know about 14a-9,
25 there's generally duties to update if you have

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 152

1 Herlihy - Confidential

2 prior inconsistent statements out there.

3 Q. But in doing your work as a corporate
4 lawyer, Rule 14a-9 is something that you often
5 have to consider, isn't that right?

6 A. 14a-9 deals with material
7 misstatements or representations and warranties
8 or omissions and statements of facts. So it's an
9 anti-fraud provision that applies to disclosure
10 documents.

11 Q. If you look at the second page of
12 this document, in the conclusion section of Mr.
13 Stern's memorandum, which is number point 2, he
14 says "Although not directly supported by the
15 language of Rule 14a-9 or any case, a court would
16 likely construe Rule 14a-9 to create such a duty.
17 Nevertheless we should preserve the point for
18 appeal." Then the question presented was "Is
19 there a duty under the proxy rules to disclose a
20 material event occurring between the mailing of
21 the proxy statement and the meeting when the
22 proxy statement makes no statement that is
23 rendered false or misleading by the event."

24 Have you ever formed a view regarding
25 that question presented?

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 153

1 Herlihy - Confidential

2 A. Look, I have never read this memo, I
3 haven't read it now, I didn't read what you just
4 said there. There is a highly technical area, I
5 was not the author, I was not the recipient.
6 There are experts in our firm on there and I
7 think that's who the question should be addressed
8 to. I'd like to be helpful but I don't think I
9 have anything of relevance to add on this.

10 Q. But is it fair to say that in your
11 area of practice, one of the things that you do
12 is advise clients such as Bank of America on how
13 to comply with the federal securities laws when
14 doing corporate filings with the SEC?

15 A. Yes, that's fair to say.

16 Q. And is it fair to say that Bank of
17 America relies on Wachtell in terms of
18 understanding how to comply with Rule 14a-9 in
19 that transaction, the merger with Merrill Lynch?

20 A. I don't know. I mean of course if
21 they've come to us with questions or were
22 generally given advice, obviously they're
23 entitled to rely on us, and we would -- if we'd
24 give advice we'd stand behind them, and that's a
25 hypothetical I'm answering in a hypothetical way.

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 154

1 Herlihy - Confidential

2 Q. Do you know did Wachtell give Tim
3 Mayopoulos or anyone else at Bank of America this
4 memorandum written by Warren Stern?

5 A. I have no idea but I'll speculate and
6 I doubt it. And as I was told about this
7 memorandum which I've never read, it was about
8 ten years old and related to a different matter
9 and different facts and circumstances.

10 Q. Who told you that?

11 A. I think Roth told me at the time that
12 there was -- that he was trying to find research
13 and he found some old dated, probably irrelevant
14 memorandum.

15 Q. Have you seen any memorandums on the
16 duty to update a material event occurring between
17 the mailing of the proxy statement and the
18 meeting when the proxy statement makes no
19 statement that is rendered false or misleading by
20 the event?

21 A. Have I seen such a memorandum related
22 to the Bank of America and Merrill situation?

23 Q. Or any proxy statement.

24 A. I certainly didn't with respect to
25 Bank of America/Merrill situation. I have no

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 155

1 Herlihy - Confidential

2 recollection of any other time.

3 Q. In the period between when the proxy
4 statement went out and the Bank of America
5 shareholders voted, how much time approximately
6 passed?

7 A. When was the proxy mailed?

8 Q. The 14a filing is November 3rd and
9 the election.

10 A. Everything was on the 5th so it was
11 about a month.

12 Q. And during that period did you
13 consider if there were any material events that
14 needed to be updated to update the proxy?

15 MR. LIMAN: Objection to form.

16 A. Well, the question was raised with us
17 with respect to Mr. Mayopoulos and others in
18 mid-December related to forecasted loss for
19 October whether that required some special
20 disclosure.

21 MR. MALLOY: I think you meant
22 mid-November.

23 A. I meant mid-November, I keep
24 misstating the dates, I apologize.

25 Q. Who worked on that analysis?

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 156

1 Herlihy - Confidential

2 A. I don't know if anyone worked on that
3 analysis, the question was raised.

4 Q. Was it raised directly to you or to
5 others at Wachtell?

6 A. The question came up, Mayopoulos --
7 Mr. Mayopoulos called me and raised the question
8 with respect to it and I think a decision was
9 made to have a conference call where it would be
10 explained, and there was a conference call with
11 the people I mentioned and there was a discussion
12 at that time, and then about a week later there
13 was another call discussing the same subject.

14 Q. And what advice did you guys give to
15 Bank of America on that issue? What advice did
16 you give to Bank of America?

17 A. I think our conclusion was, based on
18 everything we heard and presented, was that there
19 was no obligation to disclose the interim
20 forecast for the month of October.

21 Q. Why was there no obligation?

22 A. Well, I can't exactly recall, but
23 basically it was several factors. One is that
24 Merrill Lynch had been losing money for like five
25 quarters, this was a projection for the month of

Edward D. Herlihy

November 17, 2009

CONFIDENTIAL

Page 157

1 Herlihy - Confidential

2 October, I can't remember if it was a 4 to
3 5 billion dollar range, and the rest of the
4 quarter was forecasted to be flat, and Bank of
5 America had done sort of a detailed examination
6 of filings that had recently been made by both
7 them and -- by both Bank America and Merrill
8 shortly before they send their 10-Qs, and there
9 was a very strong cautionary language and trend
10 disclosure which gave everyone comfort that
11 investors and people were alerted to the current
12 market conditions and the plight that were facing
13 the company.

14 Q. Were you at the shareholder vote on
15 December 5th?

16 A. No.

17 Q. Was anybody from Wachtell there?

18 A. I believe Mr. Demmo went to the
19 meeting.

20 Q. Did he report back to you on the
21 shareholder vote?

22 A. I was away during that period of
23 time, I don't recall. I know the vote was
24 received.

25 Q. Now prior to December 5th, did you

TAB 26

Ken Lewis

October 30, 2009

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----)
)
SECURITIES and EXCHANGE)
COMMISSION,)
)
Plaintiff,)
)
VS.)
)
BANK OF AMERICA,)
)
Defendant.)
-----)

VIDEOTAPED DEPOSITION OF KEN LEWIS

New York, New York

Friday, October 30, 2009

Reported by:
Robert X. Shaw, CSR
CSR NO. 817
JOB NO. 304938

Ken Lewis

October 30, 2009

Page 262

1 Ken Lewis

2 Q. And how was that \$3 billion
3 allocated?

4 That \$3 billion was for the fourth
5 quarter?

6 A. Correct.

7 Q. And how was that allocated as
8 between the months?

9 A. I don't recall the different, the
10 months, I just recall the quoted forecast.

11 Q. Did Tim Mayopoulos receive this
12 handout?

13 A. I don't know.

14 Q. P-53.

15 (Plaintiff's Exhibit 53, documents
16 Bates Nos. 6332 to 37 , marked for
17 identification as of this date.)

18 Q. This document is entitled Merrill
19 Lynch & Co. 2008 fourth quarter Pacing & FY
20 Forecast -- and four-year forecast Scenario
21 dated 12/3/2008, revised 6 p.m.

22 A. Okay.

23 Q. Mr. Lewis, did you receive a
24 revised version of the previous document that
25 we looked at with the numbers in it?

Ken Lewis

October 30, 2009

Page 263

1 Ken Lewis

2 A. I can't recall if I received it or
3 heard about it, but I did know that it had
4 been revised.

5 Q. Okay. If you turn to the page that
6 says page 2 at the bottom, I believe you have
7 that.

8 A. Yes.

9 Q. Do you see that the revised fourth
10 quarter forecast there is \$14 billion --

11 A. Yes.

12 Q. -- pre-tax and \$8.9 billion post
13 tax --

14 A. Yes.

15 Q. -- and \$4.8 billion for November?

16 A. Correct.

17 Q. Did Mr. Mayopoulos receive this
18 document?

19 A. I don't know.

20 Q. Did you have any discussions in
21 December, 2008, prior to the shareholder
22 vote, as to whether the proxy statement
23 should be updated to disclose these
24 additional losses?

25 A. Yes. Joe Price came to me two

Ken Lewis

October 30, 2009

Page 264

1 Ken Lewis

2 different times and said he had met with Tim
3 Mayopoulos, and they had discussed the issue
4 with, ah, with Wachtel Lipton, and that the,
5 and that the issue was, should these be in
6 the disclosure, should these be disclosed,
7 and Joe said that the, ah, that they said
8 there was not a disclosable item.

9 Q. Who is the "they" in the "they
10 said"?

11 A. They, the lawyers.

12 Q. Tim Mayopoulos and Wachtel Lipton?

13 A. Yes, and Wachtel Lipton.

14 Q. And you said Mr. Price came to you
15 two times?

16 A. Yes.

17 Q. When were the two times?

18 A. I can't recall the time of the
19 first one, but sometime around this time he
20 came to me a second time.

21 Q. So, "this time" meaning December
22 3rd?

23 A. Correct. Sometime around here he
24 came again and said he had gone through the
25 same process and that the, ah, the same

Ken Lewis

October 30, 2009

Page 265

1 Ken Lewis

2 answer came back, it was not a disclosable
3 item.

4 Q. The first time that he came to you,
5 was that before you had these specific
6 numbers?

7 A. Um, yes.

8 Q. And was that in November?

9 A. I can't remember.

10 Q. He indicated that the analysis was
11 -- was the analysis the same?

12 A. Yes.

13 Q. And what factors went into that
14 analysis?

15 A. I had subsequently learned
16 probably, I can't remember if I knew then or
17 not, but there were a number of things that
18 Tim had done and Wachtel had done, and they
19 had reviewed the proxy to see if there was
20 disclosure around volatile instruments that
21 would be subject to price fluctuations.

22 They had gone back and looked at
23 the losses that had occurred prior to that,
24 of that year.

25 And there was the comment about the

Ken Lewis

October 30, 2009

Page 266

1 Ken Lewis

2 fact that it was generally known in the
3 marketplace that there is a credit meltdown
4 going on.

5 I think there was a fourth one, and
6 I can't remember.

7 Q. Did you have any direct
8 conversation with Mr. Mayopoulos on this
9 topic?

10 A. No.

11 Q. Did you have any direct
12 conversation with Wachtel Lipton?

13 A. Not that I recall.

14 Q. Did you, yourself, express any
15 position as to whether you thought this
16 information should be disclosed to
17 shareholders?

18 A. No. After that extensive ah --
19 dive into it, I would not think that I would
20 be qualified to say what was or what was not.

21 Q. During the course of that
22 discussion, did you have any input as to what
23 your view was?

24 A. No. He gave me the results of
25 their analysis.

TAB 27

Timothy J. Mayopoulos

December 1, 2009

Page 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

09-CV-6829

BANK OF AMERICA CORP.,

Defendant.

December 1, 2009
10:21 a.m.

Videotaped deposition of TIMOTHY J. MAYOPOULOS,
taken by Plaintiff, pursuant to Subpoena, held
at Securities and Exchange Commission, Three
World Financial Center, New York, New York,
before Lisa Rosenfeld, a Shorthand Reporter and
Notary Public within and for the State of New
York.

Timothy J. Mayopoulos

December 1, 2009

Page 149

1 Mayopoulos

2 to the direct report meeting notes on the front
3 page.

4 Q. Mr. Mayopoulos, on the front page,
5 the list of names, you said the last one is
6 Grimes, is that right?

7 A. That's right.

8 Q. Would that be Brenner or could I be
9 misreading it?

10 A. My handwriting is bad but it's not
11 that bad. It's Grimes, not Brenner.

12 Q. You should see mine. Did there come
13 a time in the fourth quarter of 2008 where you
14 were advised of Merrill Lynch's financial
15 performance for the quarter?

16 A. Yes.

17 Q. When was that?

18 A. Sometime around November the 12th I
19 was invited to a meeting with Joe Price and other
20 people, at which time I was advised that Merrill
21 Lynch was forecasted to have a 5 billion dollar
22 after-tax loss for the quarter, and at that -- my
23 recollection is that meeting, whether it was on
24 November 12th or sometime shortly after that, I
25 received a written forecast from Mr. Price.

Timothy J. Mayopoulos

December 1, 2009

Page 150

1 Mayopoulos

2 Q. Did you seek out Mr. Price in
3 connection with that meeting or did he come to
4 you?

5 A. I was asked to attend the meeting.

6 Q. By him?

7 A. I don't recall.

8 Q. Do you recall specifically what he
9 told you about Merrill Lynch's financial
10 performance?

11 A. What I remember is that he gave me a
12 copy of the forecast dated November 12th, walked
13 through the numbers, and it was summarized with
14 the statement that Merrill Lynch was forecasted
15 to have a 5 billion dollar after-tax loss for the
16 fourth quarter.

17 Q. At the time were you aware of any
18 expectations within Bank of America for Merrill
19 Lynch's performance in the fourth quarter of
20 2008?

21 A. I don't know what expectations people
22 had.

23 Q. Were you told by Mr. Price or anybody
24 else that they expected Merrill Lynch on Merrill
25 Lynch's performance in the fourth quarter of 2008

Timothy J. Mayopoulos

December 1, 2009

Page 151

1 Mayopoulos

2 to be flat?

3 A. Flat to what?

4 Q. Meaning no losses, no earnings.

5 A. I don't recall being told that.

6 Q. Were you told that either Mr. Price,
7 Mr. Lewis or anybody else expected Merrill Lynch
8 to break even?

9 A. I don't recall that.

10 Q. You had mentioned that you received a
11 copy of a forecast after the November 12th
12 meeting, is that right?

13 A. No, I said it was at the
14 November 12th meeting.

15 Q. Who gave you that forecast?

16 A. I believe Mr. Price did.

17 Q. Did he explain to you what was in
18 that forecast?

19 A. He walked through the numbers,
20 discussed it, yes.

21 Q. Did he explain to you what the
22 drivers of Merrill's financial performance were?

23 A. I don't recall.

24 Q. Aside from the 5 billion dollar
25 figure that you had mentioned, do you recall

Timothy J. Mayopoulos

December 1, 2009

Page 152

1 Mayopoulos

2 anything else about the information given to you
3 by Mr. Price?

4 A. I recall that the document had some
5 reference to losses for October, losses for -- or
6 results for November and then a forecast for the
7 entire quarter.

8 Q. Was Mr. Price alarmed by the
9 situation at Merrill, so far as you could tell?

10 A. He didn't seem to be alarmed.

11 Q. Did he ask you whether or not --
12 strike that. Did he tell you why he sought your
13 counsel in connection with Merrill's performance?

14 A. He asked a question of me as to
15 whether there needed to be disclosure of these
16 projected losses in connection with the
17 disclosure to shareholders and the shareholder
18 vote on December the 5th.

19 Q. What was your response at that
20 meeting?

21 A. I don't think I gave him an answer at
22 the meeting. I said I wanted to think about it
23 and talk with Wachtell Lipton about it, and I
24 subsequently had conferences with Wachtell.

25 Q. Was there a reason that you wanted to

Timothy J. Mayopoulos

December 1, 2009

Page 153

1 Mayopoulos

2 consult Wachtell on it?

3 A. I wanted their advice.

4 Q. Was it because Wachtell was the firm
5 retained to work in connection -- on the merger
6 transaction?

7 A. Well, that was one of the reasons.
8 They're also expert on these issues and I wanted
9 their advice, they were involved, they were
10 counsel to us in the transaction and they were
11 highly regarded securities lawyers. So I wanted
12 their opinions.

13 Q. Did Bank of America at the time have
14 regular disclosure counsel?

15 A. Not that I recall.

16 Q. Did you have any -- strike that.
17 Were you leaning in favor of disclosures as an
18 initial reaction after that meeting?

19 A. I think my initial impression was
20 that \$5 billion was a pretty big number and that
21 it warranted careful consideration of a
22 disclosure.

23 Q. Anybody else attended the meeting
24 besides Mr. Price?

25 A. Yes, it was Mr. Price, I think Mr.

Timothy J. Mayopoulos

December 1, 2009

Page 157

1 Mayopoulos

2 number?

3 A. Net after what?

4 Q. After taxes.

5 A. Net after taxes.

6 Q. So your recollection is that on
7 November 12th you had been advised that Merrill
8 Lynch had \$5 billion in net losses after taxes?

9 A. It was forecasted to have \$5 billion
10 in losses after taxes for the quarter.

11 Q. Were you told how much of the
12 forecast of the \$5 billion was actual losses for
13 the month of October 2008 and the first few days
14 of November 2008?

15 MR. BRESNAN: Objection to the form.

16 A. I don't recall a discussion about
17 that. The document has some information that
18 refers to October and November, but as I sit here
19 I don't recall any discussion about that.

20 Q. After the meeting with Mr. Price what
21 did you do next?

22 A. With respect to this issue, my
23 recollection is that I had conversations with
24 Wachtell Lipton. I had several conversations
25 with them, I'm not sure at this point I can

Timothy J. Mayopoulos

December 1, 2009

Page 158

1 Mayopoulos
2 really differentiate among them, but the couple
3 of days after this meeting I had conversations
4 with Wachtell Lipton to tell them -- with Ed
5 Herlihy and Nick Demmo to tell them that I wanted
6 their advice on this issue and we had discussions
7 about that.

8 Q. Who did you talk to at Wachtell
9 besides Mr. Herlihy?

10 A. Mr. Herlihy and Mr. Demmo and I think
11 Eric Roth, the litigation partner, may have been
12 involved in at least one of the discussions.

13 Q. At the time did you know Mr. Roth?

14 A. I think I had dealt with him on
15 something else. We had litigated in the
16 Netherlands with respect to our acquisition of
17 LaSalle and I think he was involved with that.
18 So I had some familiarity with him. And I think
19 he was also handling some litigation that had
20 been kind of inevitable litigation that comes
21 after the announcement of any major merger that
22 had been filed in Delaware Chancery Court, so he
23 was handling that on the Merrill Lynch
24 transaction.

25 Q. Let me show you what I marked as

Timothy J. Mayopoulos

December 1, 2009

Page 159

1 Mayopoulos
2 Plaintiff's Exhibit 161.

3 (Plaintiff's Exhibit 161, Set of
4 notes, first page bearing Bates number
5 HOGH-WLRK 502919, was so marked for
6 identification.)

7 MR. BORYSHANSKY: This is a set of
8 notes and it doesn't -- the Bates number
9 on these is not consecutive. These are
10 not necessarily consecutive notes. The
11 front page is Bates stamped HOGH-WLRK 502
12 and the number is 919. The second page
13 has the same Bates stamp but the number on
14 it is 924.

15 Q. Mr. Mayopoulos, let me direct your
16 attention to the first page of the exhibit. Is
17 that your handwriting?

18 A. No, it's not.

19 Q. On the top of the page there's
20 handwritten notes of a meeting that took place on
21 November 13th, and the attendees appear to be Mr.
22 Herlihy, Mr. Demmo and other people. At the
23 bottom of that in the middle of the page there's
24 a notation at the bottom of the meeting notes
25 that reads "Tim Mayopoulos assumed November

Timothy J. Mayopoulos

December 1, 2009

Page 160

1 Mayopoulos

2 better worry about not disclosing," do you see
3 that?

4 A. Yes. I see it's also in the little
5 box over there on the right.

6 Q. Which is not our tampering with the
7 document. Do you recall conversations with
8 Wachtell attorneys on November 13th where you
9 expressed a concern about not disclosing the
10 Merrill Lynch's -- the Merrill Lynch projected
11 losses that you had been advised of?

12 A. Well, I don't recall any discussion
13 that involved Mr. Wasserman and I don't know who
14 Shapiro is, so I don't know if this is notes of a
15 conversation that these folks had with me because
16 I don't recall having a conversation with this
17 group of people.

18 I do recall having discussions around
19 November the 13th with Wachtell Lipton in which,
20 as I say, I expressed to them that I thought that
21 we needed to give very serious consideration to
22 whether we needed to make a disclosure or not.

23 Q. Did you have a particular concern
24 about the ramifications of not making a
25 disclosure?

Timothy J. Mayopoulos

December 1, 2009

Page 161

1 Mayopoulos

2 A. Well, I certainly thought about the
3 issue of if we had something that should be
4 disclosed and we shouldn't disclose it, that that
5 wouldn't be the appropriate thing to do, and
6 beyond that, the company could have potential
7 legal liability.

8 Q. If you look at the second page at the
9 bottom, are those your handwritten notes on this
10 page?

11 A. No.

12 Q. This page refers also to another
13 meeting on November 13th and it lists your name
14 as well as Ed Herlihy's, Nick Demmo's and I think
15 it's Teresa Brenner. On the bottom there's a
16 notation "Tim all agree there must be" -- "all
17 agree, must be some disclosure," do you see that?

18 A. If you tell me that's what it says,
19 I'll accept your representation. I personally
20 can't make out the words.

21 Q. Do you recall telling Wachtell
22 attorneys that you thought there must be some
23 disclosure of Merrill Lynch's losses or projected
24 losses as you had been advising them?

25 A. No, I don't recall doing that. I

Timothy J. Mayopoulos

December 1, 2009

Page 162

1 Mayopoulos
2 recall telling the Wachtell lawyers that I
3 thought we needed to give serious consideration
4 to possible disclosure.

5 Q. Did you at any point after the
6 meeting with Mr. Price reach a tentative
7 conclusion that there must be some form of
8 disclosure?

9 A. No. I had an initial reaction that I
10 thought disclosure might be well warranted, but
11 at that point I hadn't done any analysis to sort
12 of reach a conclusion. There was no point after
13 I did the analysis that I had the conclusion that
14 there should be a disclosure.

15 Q. Aside from the size of the projected
16 losses that you had been advised of, was there
17 any other reason that prompted you to think that
18 disclosure might be appropriate initially?

19 A. No, I think I was really focused on
20 the size of the losses. But at that time I
21 hadn't gathered any more information to know how
22 that number related to Merrill Lynch's prior
23 experience.

24 Q. In your conversations with the
25 Wachtell attorneys, did anyone express a view

Timothy J. Mayopoulos

December 1, 2009

Page 163

1 Mayopoulos

2 that there must be some form of disclosure?

3 A. Not that I recall. I recall that
4 there was some discussion about potential types
5 of disclosure that could be made, but I don't
6 recall anybody reaching a conclusion that there
7 needed to be disclosure.

8 Q. What types of disclosure were being
9 discussed?

10 A. I think Mr. Herlihy might have
11 mentioned the possibility of some sort of trend
12 disclosure, but to my knowledge none of us had
13 actually done the analysis necessary to figure
14 out whether that would make sense or not and
15 nobody had actually sat down, as far as I knew,
16 prepared what that kind of disclosure might look
17 like.

18 Q. What is that kind of disclosure, a
19 trend analysis?

20 A. Well, I guess it depends who you're
21 talking about, but, you know, some lawyers would
22 use that to refer to describe a trend of events
23 or likely direction of market events. So in this
24 context I understood Mr. Herlihy to be suggesting
25 the possibility of perhaps disclosing that

Timothy J. Mayopoulos

December 1, 2009

Page 164

1 Mayopoulos

2 Merrill Lynch was having a particular trend with
3 respect to its experience on its earnings or
4 losses.

5 Q. Did you agree in your discussions
6 with Wachtell attorneys that you would do
7 additional analysis into whether or not
8 disclosure was required?

9 A. I don't remember reaching agreement
10 with them that I would do additional analysis.
11 What I remember is that I told them that I wanted
12 them to do some work on it and to think about it
13 and do whatever they thought was necessary and
14 that we needed to have further discussions about
15 it. And I decided myself that I was going to
16 look at this issue and gather up information that
17 I thought was relevant and important.

18 Q. What work did you want Wachtell
19 attorneys to do?

20 A. I wanted them to do whatever they
21 needed to do to be able to give me an informed
22 opinion about what we should do.

23 Q. Did they ask you for any information
24 about Merrill's financial situation?

25 A. Did they ask me?